IN THE

Supreme Court Of The United States

OCTOBER TERM, 1972

No.———

ANN GUNTER DRUMMOND, ET AL.,
Petitioners

vs.

ROBERT L. ACREE, ET AL.,
Respondents

vs.

COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA, ET AL.,
Respondents

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF PURSUANT TO RULE 24(5) OF THIS COURT

NOW COMES the petitioners and move the Court for leave to file a supplemental brief in support of its petition for writ of certiorari pursuant to Rule 24(5) of the Supreme Court of the United States.

Respectfully submitted
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September 1, 1972
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IN THE

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No. 72-167

ANN GUNTER DRUMMOND, ET AL.,
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vs.

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vs.

COUNTY BOARD OF EDUCATION OF
RICHMOND COUNTY, GEORGIA, ET AL.,
Respondents

PETITIONERS SUPPLEMENTAL BRIEF

SUMMARY OF ARGUMENT

Subsequent to petitioning for certiorari, **Drummond**, appears to have become a case of first impression. Pursuant to the provisions of the **Education Amendments Act of 1972**, Title VIII, Section 803, a stay application was ultimately presented to Mr. Justice Powell sitting as Circuit Justice. It was denied on grounds that the legislature intended the automatic stay provisions of Section 803 to apply only to busing orders for racial balance. Petitioners respectfully contend this to be error and have renewed their stay application with Chief Justice Burger, requesting at the same time that it be submitted to the entire court for consideration.

As Portion I of this supplemental brief demonstrates exhaustively, the ruling of Mr. Justice Powell is the exact opposite of the legislative will. It is first argued that the words of the statute authorizing a stay are so clear in meaning that no interpretation is required. But, if deemed ambiguous, voluminuos excerpts from the Congressional Record both House and Senate clearly demonstrate the proper interpretation. It is the cardinal rule of statutory construction that the court give affect to legislative intent if ascertainable. When this can be unquestionably demonstrated, as **Drummond** does, courts have no prerogative to rule otherwise.

Under the reasoning advanced by Mr. Justice Powell, petitioners respectfully submit that Section 803 becomes entirely devoid of meaning. To construe the statute as it has been applied herein means simply that Congress has agreed to delay the implementation of busing orders, the mere existence of which was expressly made unlawful by Section 806 of the same

act, and which were already illegal under this Court's ruling in **Swann.**

Also subsequent to the docketing of certiorari in this case, were two full bench opinions by the United States Court of Appeals for the Fifth Circuit. The principles announced there conform precisely to petitioners' argument when on cross-appeal, and when **Drummond** is evaluated in their light a reversal is demanded.

Even more recently, the **Equal Education Opportunities Act of 1972** passed the House and is waiting consideration by the Senate. It concerns primarily the busing of elementary school students and adopts for the first time strict limitations. Since **Drummond** involves a court ordered plan for elementary children, the legislation could result in immediate re-evaluation of this case.

Another portion of the **Education Amendments of 1972** must be considered in detail by the Court. Section 806 re-acts the precise provisions of the 1964 Civil Rights Act, Section 407(a), interpreted by **Swann,** but includes the additional directive that it be applied uniformly to every state.

Because a distinction between states was absolutely essential to the holding in **Swann,** and having obviously been abrogated, a portion of that decision must now be reconsidered. Commentary from the Congressional Record reflecting the legislative history of Section 806 is fully supportive.

Lastly, a factual analysis of the desegregation plan has been prepared. It is evaluated by the standards this court has approved and which, if considered objectively, demand reversal.

ARGUMENT

It is difficult to conceive of a more mercurial and rapidly changing field of law than school litigation. Since filing the petition for certiorari in the instant case there have been subsequent developments (procedural, judicial, and legislative) which have direct and vital application.

I.

PROCEEDINGS SUBSEQUENT TO PETITION FOR CERTIORARI

The most significant of the trilogy above referred to appears to be procedural. This observation is made without equivocation, for at least one aspect of **Drummond** has become a case of first impression. On August 11, 1972 petitioners moved the District Judge to stay implementation of the elementary school plan, subject of this certiorari.[1] As authority for their request, reliance was placed upon the moratorium provisions contained in the **Education Amendments of 1972,** a recent enactment which received considerable emphasis in the petition for writ of certiorari.

Title VIII, Section 803 (Public Law 92-318, 86 STAT. 235) reads as follows:

> "PROVISION RELATING TO COURT APPEALS
>
> Sec. 803. Notwithstanding any other law or provision of law, in the case of **any order on the part of any United States district court which requires the transfer or transportation of any stu-**

[1] The motion and other pleadings referred to are presently on file with this court and no appendix is included. Docket numbers and filing dates are noted for identification.

dent or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socio-economic status, **the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted** or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974." (Emphasis added).

By order dated August 18 said motion was denied by the District Judge and petitioners thereafter presented an application for stay to the Honorable Lewis F. Powell, sitting as Circuit Justice for the Fifth Circuit. Said application, Docket No. A-250, was filed August 24, and presented directly to this Court based on the pending jurisdiction and urgent need for immediate relief. Jurisdiction for this request was conferred by 28 U.S.C., Section 2102(f); 28 U.S.C., Section 1651(a); and Rules 27, 50, and 51 of the Supreme Court.

On August 25, 1972 Mr. Justice Powell denied the application on grounds that it had not been ruled upon prior by the Court of Appeals for the Fifth Circuit. Petitioners then sought immediate review pursuant to Rule 8(a) FRAP, and on August 26 an emergency application for stay was presented to the Honorable Lewis R. Morgan, Associate Judge of the Fifth Circuit Court of Appeals, Docket No. 72-2821.

On Monday, August 28, in an order signed by the Honorables John R. Brown, Chief Judge, and Lewis R. Morgan, Associate Judge, this application for stay was denied without comment. Upon notification a renewed application for stay, Supreme Court Docket

No. A-250, was filed the same day.

On September 1 petitioners were notified that they had been denied on grounds that the automatic stay provision of Section 803, above quoted, applied only to busing for racial busing and were inapplicable in the present case.

Petitioners respectfully contending this construction to be the antithesis of the legislative intent, have filed an exhaustively documented renewed application for stay pursuant to Rule 50(5). Its outcome is unknown at the present time.

As earlier stated a motion for stay based on the provisions of Section 803 was initially filed with the District Court. In his order the District Judge denied the motion based on a semantic distinction he drew between "appeals" and "certiorari." Petitioners contended this to be in error, and all subsequent applications contained documentation of that claim. It is extensively refuted by congressional history contained herein.

The next judicial echelon to deal with this issue on the merits was the U.S. Court of Appeals for the Fifth Circuit. In the order signed by the Honorable John R. Brown, Chief Judge, there appears only the word denied. What this means is unclear as it gives no hint of that courts' interpretation of Section 803.

It could be maintained that this represents a tacit approval of the reasoning of the District Judge. Unfortunately, it does not endorse the opinion of the lower court by commentary, so one is left undecided as to whether the denial is based on those grounds or others.

In either event it appears to be of no consequence, for Mr. Justice Powell, in his opinion, relied upon entirely different grounds. Since no mention is made of the District Court ruling it would appear that this was expressly rejected. This same thinking would hold true for the Circuit Court if their order is deemed to have adopted the thinking of the District Judge.

Because this legislation is of such recent vintage, very few opinions appear to date. Petitioners are under the impression that the opinion by Mr. Justice Powell on September 1, 1972 represents the first expression by the court on the issue.

What authority there is, however, appears to be in conflict. The U.S. Court of Appeals for the Fifth Circuit denied a stay based on Section 803 as just shown. On the other hand, the U.S. District Court for the Eastern District of Tennessee, Southern Division (Sixth Circuit) granted stay on the same statute.

Mapp v. Board of Education of Chattanooga No. 3564 in an order signed by the Honorable Frank W. Wilson, District Judge, construed Section 803 as being applicable. The busing order there is on the identical basis as **Drummond.** Although I know of no precedent for citing a District Court opinion as authority to reverse the Supreme Court, it is done here advisedly. Perhaps it will illustrate the need for consideration by nine Justices. Beginning at page 3 of the Memorandum dated August 12, 1972 it appears:

> **" . . . the Court has concluded that upon any rational construction of the statutory language, Section 803 does purport to apply to the facts and circumstances involved in the present litigation. To construe the statutory language 'any order . . . which requires the transfer or transportation**

of any student . . . for the purpose of achieving a balance among students with respect to race . . .' as having no application to school desegregation orders involving student transfers and transportation would not only be to ignore language that is in current and common widespread use as descriptive of the school desegregation plans wherein the transportation of students is involved, but would also attribute to Congress an attempt to enact an otherwise meaningless and irrelevant piece of legislation, because it could only apply to orders that are in themselves illegal in that they are in violation of the principles laid down in the Swann decision. Although this Court has repeatedly emphasized that its action in this case was directed toward the elimination of state-imposed racial segregation and not toward the imposition of any particular racial balance in any particular school, and has further emphasized that the racial composition of the student body of any school is relevant only as it may be evidence of present or past racial discrimination, **it would be to ignore the current use of the English language if the Court were not to acknowledge that the terms 'racial balance' have become a popular descriptive appellation applied to all desegregation orders wherein transportation of students is involved as a part of the plan.**

If Section 803 is to be rendered inapplicable to the present case, it would appear that such a determination would of necessity be dependent upon a resolution of the constitutionality of that legislation." (Emphasis added).

Also pending at this time is the Detroit case, **Bradley v. Milliken, et al.** No. 35257, U.S. District Court for the Eastern District of Michigan, Southern Division. It was argued before the U.S. Court of Appeals for the Sixth Circuit August 24, 1972. Section

803 was presented exhaustively by all parties including the Justice Department as Intervenor. A stay of the busing order for Detroit has been granted pending later ruling.

It thus appears, from the decisions which exist, that there is irreconcilible conflict in the interpretation of Section 803 by at least two circuits. This seems especially apparent in the **Chattanooga** case which is on all fours with **Drummond.** There is a compelling need, therefore, for direction from the entire Supreme Court.

We now arrive at the heart of the matter. It is respectfully contended that the opinion rendered by Mr. Justice Powell, sitting as a Circuit Justice, was the complete antithesis of what Congress had intended. It is generally recognized that the cardinal rule of statutory constitution to be followed by the courts is to give effect to the legislative will when ascertainable.

Such determinations, when necessary, use as their guide the legislative history of an Act. It is said to be composed of debates, amendments, committee reports, explanations by the author, comments by sponsors, and those of managers and floor leaders. Each of the foregoing is accorded different weight with the rule as follows:

> "In construing legislative intent by reference to the legislative history, the Court must differentiate between statements made by individual legislators and those made by the sponsors of the Bill, the chairmen of the committees which consider the Bill, and the conference committee reports." Annot. 70 A.L.R. 5, 26-39.

A considerable body of case law has arisen on this point. In considering weight to be given to statements made by the sponsors of a bill the Supreme Court has stated:

> "We have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt'." **Schwegmann Bros. v. Calvert Distillers Corp.**, 341 U.S. 384, 394-395 (1951).

This same language was quoted verbatim with approval in **N.L.R.B. v. Fruit & Veg. Pck. & Whse., Loc. 760**, 377 U.S. 58, 66 (1964), wherein it was also observed that:

> "The silence of the sponsors of amendments is pregnant with significance."

Ironically enough, the dissent in **Schwegmann** supra also commented on this rule:

> "It has never been questioned in this Court that committee reports, as well as statements by those in charge of a bill or of a report, are authoritative elucidations of the scope of a measure." At page 400.

Spiegel's Estate v. Commissioner of Internal Revenue, 335 U.S. 632, 679 (1949) commented on statements appearing in the Congressional Record:

> "These statements on the floor by those in charge of the Resolution are controlling, as much as though they had been submitted in a Committee Report, for they were the authoritative explanation of the Resolution's purpose and mean-

ing."

The dissent by Mr. Justice Frankfurter in this case made specific reference to the number of decisions in the last decade in which the Supreme Court had given effect to legislative history. He lists in Appendix A at page 687 three pages of citations numbering 137 separate opinions so doing.

With these rules, firmly established as they are, appreciation of Section 803 is enhanced.

The first phase in the history of Section 803 was when it was introduced by Congressman Broomfield in the U.S. House of Representatives on November 4, 1971. On that evening Mr. Broomfield stated:

> "Mr. Chairman, my amendment would postpone the effectiveness of any U.S. district court order requiring the forced busing of children to achieve racial balance until all appeals to that order have been exhausted.
>
> • • • • •
>
> ". . . [S]ome U.S. federal courts have ordered busing in recent months. In many instances, I feel that these orders are breaking new constitutional ground — that these orders have created a new and unprecedented extension of existing law.
>
> • • • • •
>
> "We can expect that many of these decisions ordering busing will be appealed and that on appeal they may be overturned. However, the appeals process is a long and difficult one. It may take two or three years. Thus, before the courts can completely decide this question, before the law is crystalized once and for all, busing will become an accomplished fact.
>
> "Mr. Chairman, forced busing may prove to be an expensive, time consuming and disruptive

mistake.

"My amendment would only delay a lower court's busing order until all those parties have had a chance to plead their case at their court of last resort."

• • • • •

Congressional Record — House H10407, H10408, November 4, 1971.

Following House passage of the "Education Amendments of 1972," with Section 803 as an amendment, a measure by the same title, but with different "anti busing" provisions, was passed by the Senate. Consequently, the Act again came up for debate in the House on a motion to send it to Conference Committee. The following debate addressed to Section 803 was had on March 8, 1972:

MR. BROOMFIELD. "Mr. Speaker, I rise to stress the importance of retaining the House language of the amendment to stay busing orders until all appeals have been exhausted.

• • • • •

"Mr. Speaker, the other body would have us discriminate against some busing orders. Some orders would be stayed pending appeal and others would not. We should write the law so that it applies uniformly to all cases which involve busing, otherwise, this law will be by definition, unfair." (Emphasis added.)

• • • • •

MR. GERALD R. FORD. "I would like to ask the gentleman several questions. First, is the Broomfield amendment retroactive?"

MR. BROOMFIELD. "Yes; it is."

MR. GERALD R. FORD. "It is retroactive in its entirety?"

MR. BROOMFIELD. "In its entirety."

MR. GERALD R. FORD. **"The second question is this: Your amendment states that the effectiveness of 'any order' to achieve a racial balance of students 'shall be postponed'.**

"Now, does that mean that it would affect orders which have already been put into effect or put into partial effect? In other words, all would be suspended pending final appeal?" (Emphasis added).

MR. BROOMFIELD. "That is correct."

* * * * *

MR. GERALD R. FORD. **"Mr. Speaker, if the gentleman will yield further, is it the intent of the author of the amendment that this stay during an appeal of any order shall be equally applicable not only to orders involving forced busing but to desegregation cases generally?"** (Emphasis added).

MR. BROOMFIELD. **"Yes; it would be, in both cases."** (Emphasis added).

* * * * *

Congressional Record — House — H1852, H1853, March 8, 1972.

After protracted debate on the "anti busing" provisions, House and Senate conferees approved a version which contained the Broomfield Amendment in its entirety. This appeared in Conference Committee Report No. 92-1085, Education Amendments of 1972, May 23, 1972, p. 220.

It was brought before the Senate shortly thereafter and Senator Pell was the floor manager. Ensuing debates contained the following remarks:

SENATOR PELL. ". . . The conferees strug-

gled long and hard over the so-called busing amendments. The Conference Report adopts verbatim the Broomfield Amendment, except that the duration of the Amendment is limited to January 1, 1974. During conference discussion, there was disagreement as to the meaning of the Broomfield language. Here I would say that a literal reading of the language by a non-lawyer would indicate that if a local educational agency is under an appealable order to transport students to achieve racial balance, that local educational agency can receive a stay of that order whether it has been implemented or not. I except that today's debate will bring disagreement from those who have more of a legal background on the subject than I. **However, I would say that the Senate is not in the habit of enacting frivolous language, and those who interpret our work as a sham and a fraud do injustice to both the Senate and the House."** Page S8282. (Emphasis added).

* * * * *

SENATOR JAVITS, speaking against the Broomfield Amendment, stated:

"Then, Mr. President, we come to the Broomfield Amendment, which was finally compromised as between the two bodies, and here again we have an absolutely flat, automatic stay of any order until appeals have been exhausted. At least, if you take the language for what the House sponsors say it means — and I will discuss that in a moment — you have an automatic stay for 19 (sic) months of any lower court order which would seek either to transfer or to transport students in respect of what again I say the Amendments House sponsors claim is an effort to desegregate in order to comply with the Constitution." Page S8286. (Emphasis added).

Senator Dominick, who is the ranking minority

member of the Education Subcommittee of the Senate and a member of the Conference Committee which reported on Section 803, stated as follows:

MR. DOMINICK. "Mr. President, as the ranking minority member of the Education Subcommittee, I rise in support of the Conference Report of the Education Amendments of 1972."

"To those colleagues who oppose the Conference Report because effect of the Broomfield language is ambiguous or not strong enough I point out that this was the best we could get. May I quote to you some legislative history from the House side describing exactly what is intended by the language. On March 8, 1972, the distinguished minority leader (Mr. Gerald R. Ford) asked the author of the Amendment several highly pertinent questions. The colloquy went like this:

"MR. GERALD R. FORD. I would like to ask the gentleman several questions. First, is the Broomfield amendment retroactive?

MR. BROOMFIELD. Yes; it is.

MR. GERALD R. FORD. Is it retroactive in its entirety?

MR. BROOMFIELD. In its entirety.

MR. GERALD R. FORD. The second question is this: Your amendment states that the effectiveness of 'any order' to achieve a racial balance of students 'shall be postponed.'

Now, does that mean that it would affect orders which have already been put into effect or put into partial effect? In other words, all would be suspended pending final appeal?

MR. BROOMFIELD. That is correct."

"The only limitations that the conference placed on the express and clearly intended language of the Broomfield Amendment are the termination date of January 1, 1974, and the statement of the conference's qualification that it affects only appealable orders. I understand this qualification to add nothing other than to substantiate the finality of the order language already contained in the Amendment. In view of the language and the legislative intent, I believe that the effect of Broomfield is clear, and my colleagues should vote accordingly with full knowledge of the consequences."

Congressional Record — Senate, S8396, S8397, May 24, 1972.

The Conference Committee Report was brought before the House in June of 1972, and Congressman Quie, the ranking minority member of the House Committee on Education and Labor and a member of the Conference Committee, co-managed the Report with Congressman Perkins. On June 8, 1972, Congressman Quie stated:

> **". . . [t]he Broomfield amendment, . . . was aimed solely at staying Federal court desegregation orders involving the transfer or transportation of students until all appeals are exhausted or until the time for taking such appeals has expired without one being taken. This is an extremely important and necessary action designed to obtain equity and uniformity in these cases, and perhaps to give the Federal judiciary some time to assess the mood of Congress and the country with respect to wholesale busing of school children."** (Emphasis added).
>
> * * * * *
>
> "Accordingly, the conference report contains

without substantive change the most significant and effective of the amendments covered by the instructions of the House. **For the first time in the field of school desegregation the Congress will be exercising its authority, which is limited under the Constitution, to regulate the actions of Federal courts."** (Emphasis added).

Congressional Record, House, H5404, June 8, 1972.

Further on in the debate on accepting the Conference Committee Report the following colloquy occurred between Congressman Broomfield and Congressman O'Hara, co-sponsors of Section 803, and Congressman Perkins, the Chairman of the Conference Committee and the Chairman of the House Committee on Education and Labor:

MR. O'HARA. "Mr. Speaker, I am particularly interested in the provisions of section 803 of the conference report.

"First, I would like to ask MR. BROOMFIELD about his meaning when his amendment spoke of an order of a district court requiring the transfer or transportation of students 'for the purpose of achieving a balance among students with respect to race, sex, religion, or socio-economic status.' In all of the court orders with which I am familiar, the court has stated that its purpose is to prevent unconstitutional segregation of students. **May I inquire of the gentleman from Michigan if it was his intention that section 803 apply to orders that have the practical effect of achieving some sort of racial balance, although the court may have stated that its order was entered for the purpose of correcting unconstitutional segregation?"** (Emphasis added).

MR. BROOMFIELD. **"Yes; it was my inten-**

tion to cover such cases and specifically, it was my intention to cover cases like those now being litigated in Richmond and Detroit." (Emphasis added).

MR. O'HARA. **"May I ask the chairman of the conference committee, the gentleman from Kentucky, if his understanding is the same as that of the gentleman from Michigan (MR. BROOMFIELD)?"** (Emphasis added).

MR. PERKINS. **"Yes, it is. It is my understanding that section 803 covers district court orders which require the transfer or transportation of students for racial purposes whether the court order is framed in terms of correcting unconstitutional segregation or whether it is framed in terms of 'achieving a balance among students with respect to race'."** (Emphasis added).

* * * * *

Congressional Record — House, H5416, June 8, 1972.

Later in the same debate, Congressman Broomfield made the following statement:

"Mr. Speaker, I would like to address one final point. There has been some confusion, some misunderstanding about the operation of my antibusing amendment. I have read with a great deal of surprise that my amendment only applies to busing for purposes of arriving at a racial balance.

"I have seen my amendment quoted out of context so as to imply that it will not be effective in preventing the vast majority of busing which is or will be ordered. I suggest that a complete reading of the language reads, 'for the purpose of achieving a balance among students with respect to race, sex, religion or socioeconomic status'.

"I repeat it halts busing ordered on the basis of socioeconomic status. That phrase was purposely added to my bill and retained only after a great deal of thought. Our feeling was that the phrase is wide enough and open enough to include any rationale or basis which a court might conceive of in order to justify busing.

"I realized that by limiting the language only to cases involving racial balance, there would be those who would try to skirt and evade the obvious and clear intent of my bill. My bill delays all busing orders pending appeal and socioeconomic covers enough ground to make sure that happens." (Emphasis added).

Congressional Record — House, H5419, June 8, 1972.

The preceding congressional commentary is comprised of extensive discussion by the author of Section 803, co-sponsors, floor managers, chairmen, and members of the Conference Committee, as well as opposition debate. With unmistakable clarity they point out the intent of the legislators.

Prophetic indeed were the final remarks by the author, Congressman Broomfield, last quoted above and underlined for emphasis. It is almost as if he were addressing them to the opinion by Justice Powell in the instant case.

Although bordering on redundancy, the importance of this issue compels me to include one final item of history. It is a release by Congressman William S. Broomfield to his constituency, seeking to provide full explanation of his amendment with particular reference to Detroit:

"It is a well settled principle of law that when

the wording in a statute is ambiguous, those who must interpret its meaning shall look to the legislative history (committee reports, debate, explanations by its author, etc.) of the language in order to determine its meaning.

"The Broomfield Amendment is ambiguous in that it speaks of 'the transfer or transportation of any students . . . for the purpose of achieving a racial balance among students.' The ambiguity arises because courts typically order desegregation of schools to carry out constitutional mandates against segregation created by an act of law (de jure segregation), but will not admit to having ordered, even where they in effect have done so, a 'racial balance' in the schools. Hence, any number of appropriations bills passed by Congress have had prohibitions against the use of Federal funds to achieve 'racial balancing,' but these have not applied to de-segregation orders by the courts or by the Department of Health, Education and Welfare in enforcing Title VI of the 1964 Civil Rights Act. Accordingly, standing alone, the language of the Broomfield Amendment arguably might not apply to the Roth decision or others like it. However, in the case of the Broomfield Amendment, the legislative history as to my intent and the understanding of the House of Representatives in adopting it is so strong that it leaves no room for doubt that it does apply to the Roth decision.

"The House, not once but on three separate occasions, discussed the Broomfield Amendment on the Floor. The first time was when the amendment was adopted on November 4, 1971. In explaining my amendment, I made reference to the statement of Chief

Justice Burger in September of 1971 to the effect that some Federal judges were misreading the Court's April decision (Swann v. Charlotte-Mecklenberg Board of Education (1971)) on busing by ordering more than the law requires. I said,

> 'Given these conflicting judicial statements on just what the law says in regard to busing, it is easy to understand the confusion and emotion that surrounds the busing issue.'
>
> 'We can expect that many of these decisions ordering busing will be appealed and that on appeal they may be overturned. However, the appeals process is a long and difficult one. It may take two or three years. Thus, before the courts can completely decide this question, before the law is crystallized once and for all, busing will have become an accomplished fact.' (H10408)
>
> 'When it is signed into law, it will constitute the first act by the Congress to prevent such assignment of transportation of pupils until the Supreme Court has had an opportunity to act on this controversial matter.' (H5406)

"Later, in the course of the same debate, additional and sustaining history was made by Mr. James O'Hara and the Chairman of the Committee, Mr. Perkins, that the language would apply retroactively to any order entered before the effective date of the legislation, so long as any appeal was pending or the time for filing an appeal had not run out with no appeal having been filed. Congressman Esch of Michigan concluded with the following words:

> 'For the first time, the very first time, the Congress in this legislation is placing a limitation on the Federal Courts in their execution of busing orders. Now there are some who argue that the

Broomfield amendment in its reference to racial balance might well apply to all busing orders, **but the legislative history, and the legislative history just repeated, indicates clearly that it applies to all orders, and that history will be determining.'** (H5417) Emphasis added).

"The legislative history of this amendment in the House is critical because the amendment originated in the House of Representatives. Ordinarily there are only a few words written or spoken concerning the meaning of a particular amendment, and where the language is in any way ambiguous the meaning may be subject to doubt. Here the legislative history is so complete, and the explanations so comprehensive and so explicit, that there can be no doubt about the scope and application of the Broomfield amendment." (Emphasis added).

One final aspect of Section 803 requires emphasis in view of the reliance Mr. Justice Powell placed on Section 802 in his interpretation.

Legislative history of the Broomfield Amendment clearly indicates that it cannot be construed in **pari materia** with the other provisions of the Education Amendments as contained in S659. The **Education Amendments of 1972** are very comprehensive and were carefully developed over a period of time by committees of Congress dealing with problems of higher education. Section 803 was attached originally as a rider to S659 on November 4, 1971. The amendment had never been referred to a committee of Congress for consideration and the Congressional Record clearly indicates that the amendment was considered by members of Congress to be not germane to the original legislation before the House of Representa-

tives. Congressional Record — House, H10407 — 10409 contains the original offering of the Broomfield Amendment and the attempts by members of Congress to prevent consideration of the amendment because of its lack of germane.

Counsel for petitioners is informed that it is a custom and precedent of the House of Representatives that when an amendment to a bill is offered, and read by the clerk of the House of Representatives, objection must immediately be made as to the "germaneness" of the amendment to the original legislation, or such objection is lost. On November 4, 1971 while the House of Representatives was sitting as a committee of the whole, question as to germaneness was raised and ruled "too late" by the Chairman.

The entire legislative history of Section 803 indicates that it was intended to operate as a separate piece of legislation, having no direct bearing on other provisions of the Higher Education Amendments, and accordingly, it should not be considered to be conditioned by, or modified by, any other provisions of the Higher Education Act.

For reasons, extensively set out in the preceding pages, this issue should be considered by the entire Court on certiorari, unless fully disposed of prior. It is petitioners fervent hope that they will have been favorably re-evaluated by that time, thereby becoming moot.

II.

RECENT CASE LAW

Less than a week after certiorari was docketed the United States Court of Appeals for the Fifth Circuit rendered two opinions that should be controlling authority insofar as this case is concerned. **Cisneros v. Corpus Christi Ind. Sch. Dist.,** ___ **F. 2d.** ___ **(5th Cir. 1972) and U.S.A. v. Tex. Edn. Agcy.,** ___ **F.2d** ___ (5th Cir. 1972), hereinafter cited as **Austin.** Both decided August 2, 1972.

Each of these decisions prescribed a series of steps for the District Court to follow in preparing desegregation orders. With one exception this basis was the same for both school districts. It was a salutary procedure such as this which petitioners implored that court, without response, to adopt while on cross-appeal.

Such selective deafness of the judicial ear compelled, of necessity, resort to this court. Admittedly, Richmond County, Georgia is not as populous as Austin or Corpus Christi, Texas; but the fate of 15,000 elementary school children and their parents deserves no less consideration.

For reasons which remain obscure the Circuit Court subsequently embraced with affection the arguments petitioners advanced to no avail. As the brief on file in this case clearly illustrates, Richmond County surged without interval from an HEW plan, considered viable and proper as late as July of 1971, into massive cross-county busing.

Bad faith of the school board was said to be the justification, yet they were operating according to the

Court approved plan, and everyone knows the high regard this Circuit Court holds for HEW proposals, as per **Austin** supra at page 20:

> "Normally, in fashioning a remedy, the recommendations of the Department of Health, Education, and Welfare are entitled to great weight." **United States v. Jefferson County Board of Education,** 372 F.2d 836, 847 (5th Cir. 1966).

These precipitous and unremitting demands of the District Court order were decried by petitioners (then cross appellants) in their brief before the Circuit Court. A central, salient issue was presented thereby:

> "To what extent is the forced busing of students pursuant to a desegregation order of the District Court constitutionally permissible?"[2]

Arguments addressed to this pivotal question began with the following premise:

> **"It should be noted at the outset that the intervenors do not challenge the rights of the court to order busing for desegregation purposes, however unpalatable it may be. The sole question under consideration here is one of extent, rather than concept."**[3] (Emphasis added).

This is a valid inquiry, yet the answers provided have been as enigmatic as the question itself. It was wholly inadequate to simply intone the trite but familiar platitude that discretion of the District Judge is all controlling. This discretion, like all discretion, has depths and heights and widths and bounds, and

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[2] Brief on Cross-Appeal, Case No. 72-1211, filed March 6, 1972.

[3] Petition for Rehearing, Case No. 72-1211, filed April 13, 1972.

each of these dimensions cannot remain forever undefined.

Adherence to an untenable position is judicially undesirable. Prophetically, this proved to be true with the Fifth Circuit. **Cisneros** supra, for all the other matter considered, has at its heart the same issue as **Drummond.** Too much busing is too much!

When again cast upon the waters this argument yielded a response, and the majority of a full bench agreed. Not only were the transportation requirements of the District Court order deemed excessive, but an understandable formula was announced for the District Judge to use upon remand.

The totality of this ruling exceeds the reach announced by any Court to date. Two separate determinations serve to brand it as unique. Not only does it discard, for the first time judicially, the "anodyne dichotomy of classical de facto and de jure segregation," but its principles are directed at a tri-ethnic group, Mexican-Americans, Blacks and Whites.

If the tennets announced here are capable of being applied in a situation as complex as this, there is all the more reason to use them in **Drummond.** This portion of the holding, entitled "Remedy", appears as follows commencing at page 20:

REMEDY

> "We turn now to the remedy fashioned by the district court. **We conclude that a different approach may achieve a constitutional result without involving the conversion of the school system from a non-transportation to a transportation basis to the extent ordered by the district court.**
>
> **"On remand, the district court is directed to**

desegregate the school system on the following basis: (Emphasis added).

(1) It is the prerogative and duty of those local officials having charge of the Corpus Christi Independent School District to formulate and implement student assignment plans.

(2) Where a student assignment plan is found to be unconstitutional, as here, because of the existence of segregation which has been imposed by statute or by official act against blacks an identifiable ethnic group (here at the Mexican-American students), it is the duty of the school officials to forthwith formulate and implement such student assignment plan as will remedy the discrimination which has been found to exist. Where one race schools continue to exist, school authorities must show that such schools are now the result of present or past discrimnation on their part. **Swann,** 402 U.S. at 26.

(3) In the event the school officials abdicate this responsibility or fail to remedy the discrimination forthwith, the district court is empowered to and should proceed forthwith to remedy the discrimination.

(4) Usually in rural, and in some city school districts where the population is diffused, assignment on a strict neighborhood basis has been sufficient to eliminate discrimination in student assignments. It is apparent that this will not suffice in the Corpus Christi Independent School District, although it may suffice as to some schools. To the extent that it does not suffice, the district court will proceed to employ other methods of desegregation.

(5) The pairing or clustering of schools, the realignment of school assignment zones, and the relocation of portable school rooms will be me-

thods of eliminating segregated schools. Pairing or clustering should be of schools in close proximity. The pairing or clustering of schools in close proximity and the realignment of school zones will result merely in an expansion of the neighborhood or community school concept. Such transportation problems as may arise will thereby be minimized. Another method of eliminating segregated schools with little increase in transportation is to restructure the assignment of students already being transported.

(6) If after untilzing the procedures outlined above, prescribed segregated schools still exist, the court must consider the pairing or clustering of schools in non-contiguous school zones. **Swann,** 402 U.S. at 28. **No such pairing or clustering of non-contiguous school zones may be required until the court has exhausted every other possible remedy which would not involve increased student transportation. Whenever the court must exercise its power to pair or cluster schools located in non-contiguous zones, it must minimize student transportation requirements in such plan as is devised to pair or cluster schools located in non-contiguous zones.** (Emphasis added).

The length and time of travel for students under any plan must be considered in light of the age of the children, and the risk to health and probably impingement on the educational process. **Swann,** 402 U.S. at 30-31. The material consideration in assessing the probable effect on health and the educational process as to each particular child will be the time required for transportation as distinguished from distance. Under some plans, children will be transported from their neighborhood school to the school of assignment rather than from their homes to the school of assignment. In such event, the time consumed in travel must include the time necessary to reach

the neighborhood school or other point of embarkation.

*****

(7) As the Supreme Court made clear in Swann, the requirement of ' . . . any particular degree of racial balancing or mixing . . . ' as a matter of substantive constitutional right would be disapproved. 402 U.S. at 24. Such racial balance as may result from the pairing or clustering or rezoning of schools is constitutionally permitted as 'an interim corrective measure.' Swann, 402 U.S. at 27."

Austin, the companion case, contains a specially concurring opinion approved by eight of the fourteen judges on the full bench. It adopts the same seven standards just enumerated, plus an additional one applicable only to that case. Perhaps of greatest importance, however, is the preamble to the special concurrence which provides even more specific guidance to District Judges.

This opinion of Judge Bell, also author of the remedy just quoted, represents consummate forensic expression. Not only does it extract with precision the key points of **Swann** and **Davis**, but goes further and reduces them to a workable procedure readily understood. This is not mere rhetoric, but analytical expertise by a judge on the circuit dealing with more school cases than all others combined.

These observations in **Cisneros** and **Austin** are trenchant and incisive, providing illumination for judges and counsel alike. In recognizing the District Courts' needs for "definitive direction", logic is injected into this labyrinthine maze, thereby fulfilling the highest obligation of an appelate court.

This concurrence begins at page 71:

"In our view the remedy which the district court is required to formulate should be formulated within the entire context of the opinion in **Swann v. Charlotte-Mecklenberg Board of Education,** 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, and the companion case of **Davis v. Board of School Commissioners of Mobile County,** 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

"In giving effect to Swann we have in mind that the Supreme Court has placed the primary responsibility for desegregating public schools on the 'informed judgement' of the district courts. It is necessary, however, in the appellate process, where many complicated school cases involving urban school systems are within the jurisdiction of this court, that some definitive direction be given with respect to the remedy which is to be fashioned in the district courts. (Emphasis added).

"There are two key passages in **Swann** which have to do with the remedy which is appropriate in school desegregation cases and we read these as being concomitant. The first is concerned with the power of the federal courts. The other pertains to the constitutional duty of the school authorities. With respect to power the Supreme Court said:

'[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

'In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers

may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

'School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy.' 402 U.S. at 15-16.

"The difference between the broad power of the school boards in making student assignments and the limitations on the power of the federal courts is explicit and at once apparent from **Swann.** In the federal courts, the nature of the violation determines the scope of the remedy."

* * * * *

At page 75:

"Given these principles, and the other definitive instructions contained in **Swann** and **Davis,** we have concluded that the district court should proceed to eliminate the dual school system as it has existed in **Austin** together with any and all discriminatory segregation which exists against Mexican-American and black students on the following basis:"

(Herein are listed the seven steps earlier set out,

as well as an additional point to be discussed later).

* * * * *

"An overall amelioration of any possible discrimination will tend to be accomplished by the use of the mandatory majority to minority transfer provision of **Swann,** supra, 402 U.S. at 36-37, heretofore ordered by the district court. Such a provision will guarantee to both races an unfettered right to attend schools with members of an opposite race or identifiable ethnic group, and with transportation provided. The district court is directed to constitute a tri-ethnic committee in the school district to foster the use of the majority to minority transfer.

"We have previously outlined the requirements of desegregating school systems from the standpoint of faculty, staff, transportation, extracurricular activities, and facilities. **Singleton** v. **Jackson Municipal Separate School District,** 5 Cir., 1970, 419 F.2d 1211. See also **Carter v. West Feliciana Parish School Board,** 5 Cir., 1970, 432 F.2d 875, 878-79, explicating the **Singleton** rule to preserve and maintain a non-discriminatory merit system in faculty selection and retention. This left only the question of student assignment and we know from experience that this question has resolved itself principally into student assignment in urban school districts. Fidelity to the principles announced in **Swann** and **Davis** and the use of the approach outlined herein offers the best promise of promtly resolving the student assignment question posed in an urban school district such as Austin."

The additional consideration not appearing in **Cisneros** was necessitated by the comparison of the **Austin** school system. At page 75:

* * * * *

"(3) The power of the district court will depend first upon a finding of the prescribed discrimination in the school system. **Swann,** 402 U.S. at 16. In determining the fact of discrimination **vel non,** whether imposed by statute or as a result of official action, the district court must identify the school or schools which are segregated as a result of such discrimination. This identification must be supported by findings of fact. The importance of such a determination will be seen in some populous school district embracing large geographical areas. There may be segregated schools which are the result of unconstitutional statutes or of official action. There may be other one race schools which are the product of neutral, non-discriminatory forces."

* * * * *

This language has tremendous significance in the present case. A three judge panel of the same circuit court has ruled that the schools of Richmond County are operated on a de jure as well as a de facto basis.[4] Yet no finding of fact by the District Judge appears in the record sufficient to enable a designation of which schools fell into what category.

Notwithstanding this a blanket order affecting 29 elementary schools was approved by the Appeals Court only three months ago, with no consideration given this point. Both **Austin** and **Cisneros** are full bench opinions, and it is respectfully contended that the above portions must be applied to **Drummond.** This is especially true in view of the fact that the findings of the three judge panel are not compatible with the mandatory directives of the entire bench.

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[4] Petition for Certiorari, Appendix I, Page A-3.

Since the Court of Appeals for the Fifth Circuit, speaking through an en banc decision has now announced the law, no plausible reason exists for depriving petitioners of its use. By simply castigating the school board and doubling the punishment accorded, the demands of justice are not met. This court, as did those below, sits as one of Equity and its decisions must reflect it.

Whatever the shortcomings of the school board may have been, it must be recognized that they undertook to correct the situation once their duty was sufficiently appreciated. In June of this year a constitutionally acceptable plan for secondary schools was presented to and accepted by the District Judge. It required little or no increase in busing.

This action shows two things: an awareness of obligations; and secondly, it underscores the fact that the elementary plan is an overkill. Petitioners have steadfastly asserted this second observation. We have never argued, as briefs on file with the Circuit Court show, that busing is illegal,, although admittedly we do not like it. All we have ever said is that reason and the principles pronounced by **Swann** must be applied.

Instead of vaulting to the pinnacle of absurdity, less devastating remedies should be exhausted. This is what the Circuit Court, by full bench decision, has just said in separate cases. There can be no equity, whatsoever, by imposing upon 15,000 of the youngest students in the system, some punitive measure claimed justified by misfeasance of a body whose actions they could not control.

III

RECENT LEGISLATIVE PROVISIONS

Recent legislation is equally innovating. On August 18, 1972 the **Equal Educational Opportunities Act of 1972** passed the House of Representatives by an overwhelming vote and was read for the first time in the Senate. Both bodies of Congress recessed that day until September 5, 1972 at which time it will be considered by the upper house.

The purpose and policy of this measure is unique as it recognizes, for the first time legislatively, the miasma of school desegregation in its present form. By stating that the neighborhood is the appropriate basis for determining public school assignments, this bill expresses a view neither new nor revolutionary. Fortunately, it does not stop here, but seeks to deal completely with the problem at hand by specifying appropriate remedies for the orderly removal of vestiges of any dual system.

I realize fully that this is not yet law. However, it reflects the views of some 300 members of the House of Representatives, the President of the United States who introduced legislation, and approximately 80% of the population of this country (depending on which poll was followed). Because of this it merits credence and consideration by the Supreme Court.

When one remembers that it follows by less than two months the **Education Amendments of 1972,** it takes on special significance. That act represented the first congressional restraint ever placed on a District Court in school litigation. The moratorium provision of Title VIII, Section 803 (Broomfield Amendment) postponed the effectiveness of desegregation orders

until reviewed by the Supreme Court.

This proximity in time and similarity in purpose reflects a dominant mood in the country. If sentiment so overwhelming is given no expression, our purported democracy becomes a fraud. Exactly what governmental form it would be is debateable, but certainly the tail would be wagging the dog.

For these reasons I have taken the liberty of quoting at length from this act.

EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1972 — POLICY AND PURPOSE

SEC. 2 (a) The Congress declares it to be the policy of the United States that ——

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this Act to authorize concentration of resources under the Emergency School Aid Act on educationally deprived students and to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

TITLE II: UNLAWFUL PRACTICES DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY PROHIBITED

SEC. 201. No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ——

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with title IV of this Act, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

SEC. 3. (a) The Congress finds that —

(1) the maintenance of dual school systems

in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers

granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems.

• • • • •

BALANCE NOT REQUIRED

SEC. 202. The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

ASSIGNMENT ON NEIGHBORHOOD BASIS NOT A DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY

SEC. 203. Subject to the other provisions of this title, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws.

• • • • •

TITLE IV: REMEDIES

FORMULATING REMEDIES; APPLICABILITY

SEC. 401. In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

SEC. 402. In formulating a remedy for a denial of equal educational opportunity or a denial of the

equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or on the first combination thereof which would remedy such denial:
(Emphasis added)

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 403;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 403 and 404 of this Act.

TRANSPORTATION OF STUDENTS

SEC. 403. (a) No court, department, or agency of the United States shall, pursuant to section 402, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

DISTRICT LINES

SEC. 404. In the formulation of remedies under section 401 or 402 of this Act, the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and had the effect, of segregating children among public schools on the basis of race, color, sex, or national origin.

VOLUNTARY ADOPTION OF REMEDIES

SEC. 405. Nothing in this Act prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this title, nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this tile, if such plan is voluntarily proposed by the appropriate educational agency.

REOPENING PROCEEDINGS

SEC. 406. On the application of an educational agency, court orders, or desegregation plans under title VI of the Civil Rights Act of 1964 in effect on

the date of enactment of this Act and intended to end segregation of students on the basis of race, color, or national origin, shall be reopened and modified to comly with the provisions of this Act. The Attorney General shall assist such educational agency in such reopening proceedings and modifications.

LIMITATION ON ORDERS

SEC. 407. Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the equal protection of the laws shall, to the extent of such transportation, be terminated if the court finds the defendant educational agency is not effectively excluding any person from any school because of race, color, or national origin, and this shall be so, whether or not the schools of such agency were in the past segregated de jure or de facto. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found to be effectively excluding any person from any school because of race, color, or national origin, and this shall be so, whether or not the schools of such agency were in the past segregated de jure or de facto.

SEC. 408. Any court order requiring the desegregation of a school system shall be terminated, if the court finds the schools of the defendant educational agency are a unitary school system, one within which no person is to be effectively excluded from any school because of race, color, or national origin, and this shall be so, whether or not such school system was in the past segregated de jure or de facto. No additional order shall be entered against such agency for such purpose unless the schools of such agency are no longer a unitary school system.

Even casual reading of these provisions makes it abundantly clear that passage of anything resembling the present form would have immediate bearing on this case. We are dealing here with an elementary school plan requiring massive cross-county busing of young children, the exact situation this act seeks to legislate against.

It is a precursor of things to come, and unless rejected entirely, or totally emasculated by the Senate, this case will once again become the subject of judicial review.

Although premature, the inevitable question of whether this act is constitutional requires mention. As the following briefly illustrates, there is impressive authority to support the position that it would be.

> MR. PUCINSKI: "I believe that this act represents the best we in Congress can do at this point in time, and I urge my colleagues to support it."
>
> "Constitutional experts who have argued in favor of the constitutionality of this type of legislation:
>
> Charles Bork, Yale Law School;
>
> Charles Allen Wright, University of Texas Law School;
>
> Archibald Cox, former Solicitor General of the United States."
>
> Congressional Record — House, H7799, August 17, 1972.

Professor Robert H. Bork, above referred to, has prepared a special analysis which explores this question in some depth.[5] Concerning the regulation of bus-

[5] Robert H. Bork, **Constitutionality of the President's Busing Proposals**, American Enterprise Institute, Washington, D.C., May 1972.

ing remedies he remarks at page 21:

> "The purpose of the provision, however, is to limit the busing of elementary school children, and there may be cases in which a district judge, free of the inhibitions of this measure, would order more busing than it permits. It is the existence of this situation that some commentators believe renders the proposal unconstitutional. But such an analysis seems simplistic. We have seen that Congress has significant power to regulate remedies, and, by definition, that means the power to require courts to apply different remedies than they would have chosen if they were completely free.
>
> "The issue of constitionality is not whether the proposed act would inhibit the use of busing (of course it would) but whether the inhibition is so great that the courts would be rendered unable to perform their constitutional function. We are necessarily dealing with a question of degree. There are good reasons to think that the degree of inhibition here is not so great as to interfere with the constitutional role of the courts. The constitutional per se rule of **Brown I** (a state or its agencies may not discriminate on grounds of race) is left entirely intact. The affirmative duty of a de jure segregated school system to desegregate is left intact. That duty, as we have seen, cannot be an absolute, and has never been held to be an absolute, because other values must be taken into account. There are many remedies other than busing available to courts and a limitation upon busing for elementary school children hardly appears to be an exercise of judgement beyond the proper scope of Congress' powers. If it is, Congress has very little real power under Section 5 of the Fourteenth Amendment.
>
> "The constitutionality of this provision de-

pends essentially upon the reasonableness of the judgements that busing is less appropriate for children in the elementary grades than it is for older students and that factors of time and distance as well as numbers of children involved are relevant criteria. Arguments for and against these propositions have often been made and there is no need to rehearse them here. Suffice it to say that reasonable men can conclude that the propositions are correct.

"It may be possible to construct an example in which the regulation of busing elementary school children seems unduly restrictive, but that is not sufficient reason to discard the entire statute. As Chief Justice Hughes said after noting the reasonableness of the Minnesota mortgage law, 'It does not matter that there are, or may be, individual cases of another aspect. The legislature was entitled to deal with the general or typical situation.'

"Finally, Section 403(a) gains support from the fact that the Supreme Court has recognized as proper the type of distinction the law draws. In discussing the factors to be weighed in framing busing orders, Chief Justice Burger stated in **Swann I**: It hardly needs stating that limits on time of travel will vary with many factors, but probably with none more than the age of the students.

"On balance, therefore, it appears that a good case can be made for the constitutionality of the President's proposal to limit busing of elementary school children."

While not precisely on point **F.H.E. Oil Co. v. C.I.R.**, 150 F.2d 857 (5th Cir. 1945) recognizes that such legislation may have legal significance, even though it never becomes law:

"A resolution adopted by the House of Representatives and agreed to by the Senate but not approved by the President or passed over his veto, was not an act of Congress and did not make or change the law, but as an expresson of opinion on a point of law, it would be entitled to respectful consideration by the courts."

IV

EDUCATION AMENDMENTS OF 1972, TITLE VIII, SECTIONS 803-806.

In light of its peregrinations through the Federal judiciary, little perspicacity is required by petitioners to realize that the point of no tomorrow is rapidly approaching. With this uppermost in mind, time is a luxury not enjoyed. Consequently, it is necessary to anticipate the Courts' response and prepare acoordingly.

Considering the overwhelming documentation, entirely contrary to the premise upon which Mr. Justice Powell based his ruling, it appears reasonable to expect that the Court will consider this issue afresh. At such time it is also anticipated that the outcome will ultimately depend upon a determination of constitutionality. To this point the following remarks are addressed.

Each of this Act's last four sections (803-806) have a common scheme: they restrict, limit, or even preclude powers of the District Court. Although the authority of Congress to take such action has never been questioned in other areas of law, this represents a historic first in school litigation. Congressional power to effectuate these measures though, comes from the same repository — the Constitution of the United States.

Several provisions appear sufficient to authorize this legislation without question, and, upon closer consideration, create the distinct impression that Congress possesses adequate residual muscle to justify much more stringent measures should it desire. Article I provides the first indication that Congress was ex-

pected to exercise some control over the judiciary. Section 8 deals with specific powers of Congress and authorizes it at Clause 9:

> "To constitute Tribunals ineferior to the Supreme Court".

Clause 18 of this same section represents the broadest grant of authority expressed in the Constitution. It directs Congress:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."

Further evidence that a degree of congressional dependence by the judiciary was intended comes from Article III. Section 1 reads in part:

> "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Finally, there is the Fourteenth Amendment itself. Under the "equal protection clause" of Section 1, it has provided the cornerstone for school decisions. This article may, in the final analysis however, provide strongest authority for congressional action. Section 5 reads:

> "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

An examination of the provisions quoted gives rise to supporting theories mutually separate and distinct. Since the Act applies, by its own terms, to District Courts, both are legitimate. It can thus be argued that this legislation represents congressional exercise of its power to affect the jurisdiction of an inferior

Federal court under Article III, or simply use of the "enforcement powers" of §5.

This Court's history is replete with decisions recognizing that jurisdiction of lesser tribunals is absolutely dependent upon Congress. In one form or another, opinions for at least 173 years have noted it: "The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise. . ." **Turner v. Bank of North America,** 4 Dall. 8, 10 n.I (U.S. 1799). "Courts created by statute can have no jurisdiction but such as the statute confers." **Sheldon v. Sill,** 8 How. 441, 449 (U.S. 1850).

An excellent discussion of Act III, Section 1, appears in **Kline v. Burke Construction Co.,** 260 U.S. 226, 234 (1922):

> "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. **Turner v. Bank of North America,** 4 Dall. 8, 10, 1 L.Ed. 718; **United States v. Hudson & Goodwin,** 7 Cranch, 32, 3 L.Ed. 259; **Sheldon v. Sill,** 8 How. 441, 448, 12 L.Ed. 1147; **Stevenson v. Fain,** 195 U.S. 165, 25 S.Ct. 6, 49 L.Ed. 142. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated

cases, but it requires an act of Congress to confer it. **The Mayor of Nashville v. Cooper**, 6 Wall. 247, 252, 18 L.Ed. 851. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. **The Assessors v .Osborne**, 9 Wall. 567, 575, 19 L.Ed. 748. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right."

A final example on this point, somewhat more recent, is **Lockerty v. Phillips**, 319 U.S. 182, 187 (1943). It is persuasive authority for the proposition that Congres, by restricting a District Court's use of busing, has withheld jurisdiction to a degree. Rather than use only the remarks of Chief Justice Stone, I prefer to repeat in its entirety that portion of the earlier decision quoted from:

"Second, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. **To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited**

by its own discretion merely." **Cary v. Curtis**, 3 How. 236, 245 (1845). (Emphasis added)

Although unnecessary to consider in the context of this argument, any discusion of jurisdiction and congressional power leads one inexorably to **Ex Parte McCardle**, 7 Wall. 506, 514 (1868). It stands for the proposition that appellate jurisdiction, even of the Supreme Court, rests within the control of Congress under Article III §2.

This is perhaps the high-water mark in judicial acknowledgement of congressional power. In the wake of voluminous debates as to the constitutionality of the President's anti-busing proposals it has become a much mentioned decision.

While an appeal in a habeas corpus case was pending before this court, Congress withdrew jurisdiction. Chief Justice Chase observed:

> "[T]he power to make exceptions to the appellate jurisdiction of this court is given by express words, . . . Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Even though some modern scholars may seek to disparage it as precedent today, one would do well to remember that this is a unanimous opinion, unreversed after more than 100 years.

As convincing as the foregoing may or may not have been, Section 5 of the Fourteenth Amendment affords a cogent justification that is hard to quibble with. The current trend of constitutional thought

seems to be that the powers it affords Congress are quite broad. This observation finds support in recent case law, as well as authoritative treatises. According to the excellent work of Professor Bork,[6] the scope of these powers is the subject of heated current debate. This is succinctly described in a paragraph attributed to Professor Archibald Cox:

> "Today one of the major questions of constitutional theory and practice is whether the congressional power to make binding determinations upon questions of fact and degree, acknowledged under the commerce clause, applies to legislation enacted by Congress 'to enforce' the fourteenth amendment."[7]

Those who would answer that it does, find vast support in **Katzenbach v. Morgan,** 384 U.S. 641 (1966). This case arises under the **Voting Rights Act of 1965** and deals extensively with Section 5. Referring to congressional power the majority quotes with approval at page 648:

> "It is the power of Congress which has been enlarged. Congress is authorized to **enforce** the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." **Ex parte Com. of Virginia,** 100 U.S. 339, 345 (1880). (Emphasis in original).

At 650:

> "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18. The classic formulation of the reach of those powers was established

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[6]Bork supra note 5 at 8.

[7]Cox, **The Role of Congress in Constitutional Determinations,** 40 Cincinnati Law Review 199, 258 (1971).

by Chief Justice Marshall in **McCulloch v. Maryland**, 4 Wheat, 316, 421, 4 L.Ed. 579:

> 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.'"

At this point reference is made to the earlier decided voting right case, **State of South Carolina v. Katzenbach**, 383 U.S .301, 326, 327 (1966), in dealing with the power afforded Congress by a similar section, it quoted the words of Chief Justice Marshall:

> "This power like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." **Gibbons v. Ogden**, 9 Wheat. 1, 196, 6 L.Ed. 23.
>
> * * * * *
>
> "The basic test to be applied in a case involving Section 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress . . ."

That test was identified as the one formulated in **McCulloch v. Maryland**, and since Section 2 of the Fifteenth Amendment is identical to Section 5 of the Fourteenth Amendment (as well as Section 2 of the Thirteenth, Eighteenth, and Nineteenth Admendments), it was adopted by **Morgan** supra who stated:

> "Thus the **McCulloch v. Maryland** standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what leg-

islation is needed to secure the guarantees of the Fourteenth Amendment."

The upshot of this decision appears to be a clear recognition of the broad discretion vested in Congress under Section 5. Reasoning in support of this conclusion relies heavily upon the fact that Congress enjoys a position which enables them "to assess and weigh the various conflicting considerations" in a manner superior to that of the court. This appears only logical, and if ever an issue arose which required this vital function, it must be the question of busing. Professor Bork is of this opinion:

> "The nature of the problem is one peculiarly suited to Congress' superior capacity for finding facts on a nationwide scale and making the detailed trade-off judgements required to frame a general rule applicable everywhere in the country. Courts, confined to particular fact situations and the record the litigants set before them, are less able to work out satisfactorily detailed legislative rules of the sort required here. That is the reason for the deference courts often show to congressional determinations of fact and to congressional alteration of remedies. We may conclude that Congress possesses substantial power to regulate busing under Section 5 of the Fourtenth Amendment."[8]

Having established the preferred constitutional source for the power Congress seeks to assert, it is susceptible to further refinement. "Section 5 of the Fourteenth Amendment, taken at the minimum weight that must be allotted it, confirms and reinforces Congress' historic power to deal with remedies employed by Federal courts. There is doubt about Congress'

[8]Bork supra note 5 at 16.

power to deny all remedies for an established right, but very little about its power to limit or even deny one among many".[9]

This particular point is well covered in a unique and enlightening article by Professor Henry M. Hart. The following comments are found in an uninhibited colloquy between Professor Hart as interrogator and Professor Herbert Wechsler of Columbia.

> Question: "The power of Congress to regulate jurisdiction gives it a pretty complete power of remedy, doesn't it? . . ."
>
> Answer: ". . . The denial of any remedy is one thing — that raises the question we're postponing. But the denial of one remedy while the other is left open, or the substitution of one for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension."
>
> Question: "Why is that plain?"
>
> Answer: "History has a lot to do with it . . . But the basic reason, I suppose, is the great variety of possible remedies and even greater variety of reasons why in different situations a legislature can fairly prefer one to another."[10]

It goes without saying that there are no decisions on this point in the area of school desegregation. For almost a score of years the current has only gone in one direction, and as noted, congressional action in this regard is without precedent.

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[9]Bork supra note 5 at 11.

[10]Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harvard Law Review 1362, 1366 (1953).

Decisions of this Court, from its inception, have recognized the inherent power of Congress to affect remedies. The following opinions are illustrative and, though dealing with a variety of matters, their principles, by parity of reasoning, apply.

Chief Justice Marshall, in an opinion concerning state insolvency laws, gave full recognition to this point:

> "The disinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of a nation shall direct." **Sturges v. Crowninshield,** 4 Wheat. 122, 200 (1819). See also the procedural case of the same vintage, **Bank of Columbia v. Okeley,** 4 Wheat, 235, 245 (1819).

Another early decision, which dealt with the right of contract, was **Antoni v. Greenhow,** 107 U.S. 769 (1883). Chief Justice Waite approves the language of an earlier opinion:

> "It is competent for the state to change the form of the remedy, or to modify it otherwise, as they may see fit, providing no substantial right secured by the contract is thereby impaired . . ." **Von Hoffman v. Quincy,** 4 Wall. 553 (1869).

and concludes that:

> **"In all cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge."** (Emphasis added)

Finally, **Munn v. Illinois,** 94 U.S. 132 (1872):

> **"We ought never to overrule the decision of the legislative department of the government un-**

less a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account." (Emphasis added)

With this lengthy preamble in mind, it is appropriate to turn now to the legislation in question. Four sections are of concern here (803-806). As the reader is aware, 803 (Broomfield Amendment) was discussed at length in Portion I.

These remarks, however, were limited to a point raised in the opinion of Mr. Justice Powell concerning congressional intent. This portion seeks to further buttress the constitutional underpinnings of the moratorium. Being a case of first impression little authority exists.

Fortunately for petitioners, however, considerable guidance has been obtained from the treatise of Professor Bork, whose remarks appear ubiquitously in this brief. Although dealing with the moratorium provisions of the Nixon anti-busing proposals, it is extremely relevant, since that language is virtually identical to Section 803. An extensive quote from this treatise is most convincing:

> "Congress' power to enact moratorium legislation in order to hold matters in status quo while it considers detailed regulation is probably best located in Article I, Section 8, Clause 18 . . . The moratorium can be defended as necessary and proper for Congress to carry into execution its power to regulate remedies, a standstill in busing orders being required so that irreparable disruptions and impairments of education do not take place before Congress can act.
>
> ". . . This means, essentially, a showing of the

likelihood of the entry of further large-scale busing orders with their concomitant heavy expenditure of funds, administrative disruption, and student inconvenience, all tending to disrupt and make less effective the educational process. Combined with such a showing should be an argument that there is reason to believe these orders go beyond the duty of affirmative dismantling of segregated school systems, and that the disruption and expense will have to be undergone a second time in order to comply with the further legislation contemplated by Congress."[11]

This thinking seems particularly appropriate in view of the recent House passage of the **Equal Educational Opportunities Act of 1972,** detailed in Portion II. From this it is apparent that at least one body of Congress wishes to effectuate detailed regulation of school busing.

This brief is likewise replete with quotations from the Congressional Record declaring the need for such a moratorium. A prime example is found in the remarks of Congressman Quie:

> "This is an extremely important necessary action designed to obtain equity and uniformity in these cases, **and perhaps to give the Federal judiciary some time to assess the mood of Congress and the Country with respect to wholesale busing of children."** (Emphasis added)
>
> Congressional Record — House — H5404, June 8, 1972.

While designed to automatically halt, pending appeal, all busing orders, regardless of title or nomenclature, it was held inapplicable in the present case. This position not only frustrates the will of Congress,

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[11]Bork supra note 5 at 19.

but ignores language currently used in school desegregation plans. Most important, the Court in so ruling has attributed to Congress the enactment of meaningless and futile legislation.

Under the interpretation reached in **Drummond** this is the inevitable result. Section 803 is said to apply only to orders whose mere existence makes them illegal for violating the principles laid down in **Swann**, and also Section 806 of the same act.

To illustrate this point, the following excerpts from **Swann** need be remembered. At page 15:

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."

Further, at page 15:

> "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked."

At page 16:

> "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults."

Further, at page 16, with reference to whether schools should have a prescribed ratio of black to white:

> "To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court."

At page 17, concerning 407(a)

> "The legislative history of Title IV indicates

that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation'."

The thrust of these remarks by Chief Justice Burger is to emphasize repeatedly the condition precedent to judicial involvement.Without a constitutional violation, uncorrected by school officials, judicial authority does not exist. Courts simply have no power to interfere with school systems unless there has been a constitutional violation. Vestiges of de jure segregation is considered by the courts to be such a violation. Therefore, this has been deemed sufficient to justify the use of busing as one tool for desegregation in those states.

De facto segregation, much to the contrary, is not a constitutional violation and no right of action is created. Since de facto states are not considered unlawfully segregated, it logically follows then, that busing to desegregate schools would be impossible. Therefore, busing ordered in such states could only be to "achieve racial balance". This was noted in Mr. Justice Powell's opinion at page 3; "In short, . . . the phrase 'achieve a racial balance' was used in the context of eliminating 'de facto segregation'."

De facto segregation, however, is not a constitutional violation and no right of action exists. Consequently, no justification for judicial intervention is shown and any order which required busing would be illegal on its face. Thus Section 803, under the ruling of this Court, can only apply to situations which have already been declared unlawful by **Swann.**

Under the reasoning of Mr. Justice Powell, Congress has indeed performed an act of abysmal futility,

even more vividly demonstrated when juxtaposed with Section 806 which provides that:

> "Application of Proviso of Section 407(a) of The Civil Rights Act of 1964 To The Entire United States
>
> Sec. 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system . . . regardless of whether . . . situated in the northern, eastern, western, or southern part of the United States."

When Section 803 is given the construction received in **Drummond,** its only possible affect would be to delay implementation of court orders, the very existence of which has been expressly forbidden by Section 806. It is also essential to note that the "evil" Congress sought to avoid with the "remedy" of Section 803, appears not only unlawful, but nonexistent. All evidence points that way, for no opinion dealing with an order which requires busing "to achieve racial balance" has been reported. Certainly this monstrous illogic was never intended by the House, Senate, and President.

The true and undeniable intention of Congress was made manifest in Portion I. Unfortunately, these explicit considerations have been muted by judicial ukase. Many years ago Mr. Justice Frankfurter,

Spiegel's Estate v. C.I.R., 335 U.S. 632, 682 (1949), addressed himself emphatically to the duty of our highest court in a situation far less compelling than this:

> "Due regard for this Court's function precludes it from ignoring explicit legislative intention even to 'yield results more consonant with fairness and reason'. **Anderson v. Wilson,** 289 U.S. 20, 27, 53 S.Ct. 417, 420, 77 L.Ed. 1004; see **Cardozo,** The Nature of the Judicial Process 14 (1921)."

At this point full consideration of Section 806 is imperative. It appears, by far, the most significant portion of the Act, since Congressional disapproval with at least one part of **Swann** is clearly evinced. Not only does it re-enact the identical language of 407(a), already interpreted by that decision, but adds the new directive that these provisions apply uniformly to every state. With this simple egalitarian-addition an entirely new dimension is achieved.

Acting almost on the heels of **Swann,** it cannot be said that, "Congress has not seen fit to amend the statute and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts". **Electric Storage Battery Co. v. Shimadzu,** 307 U.S. 5, 15 (1939); **Girouard v. U.S.,** 328 U.S. 61, 70 (1946).

Section 806 represents the exact opposite of the rule often relied on that re-enactment of a statute carries gloss of construction placed upon it by this Court (see **Spiegels** supra at 690, Appendix B, 50 Am. Jur. Statutes, Section 441). Instead of reflecting approval, this measure is now worded so as to completely

undermine that decision.

Chief Justice Burger's interpretation of 407(a) in **Swann** was based on several considerations, most prominent being the disparte status of de jure and de facto states. Legislative history was relied upon heavily. He concluded that Title IV created no right of action in those 30 or more states classified as de facto. Conversely, he held that other states, being de jure, could derive no benefit from the provisions of 407(a), which forbid the transportation of students.

This leads to a perplexing impasse, for how can this opinion be reconciled with the terms of Section 806? The interpretation, arrived at in **Swann,** depends entirely upon a distinction between states, but uniformity requirements added by subsequent re-enactment demand that there be none.

Two conclusions appear virtually inescapable. They cannot be reconciled and Congress has expressly rejected that portion of **Swann** which interprets 407(a). No other deductions seem possible, for Congress has seen fit to reject the distinction, so absolutely essential to that construction.

Legislative history, as earlier noted, played an important role in arriving at the meaning **Swann** accorded the language of 407(a) now incorporated in Section 806. It proves equally decisive here, for though the discussion is brief, it is most informative. Section 806 was authored and sponsored by Senator Ervin who described it as follows:

> MR. ERVIN. "Mr. President, I can state the amendment simply. **This amendment merely provides that the prohibition on busing to achieve a racial balance shall apply in all circumstances to**

all parts of the United States, and that those areas of the country which did not anticipate the Supreme Court in discovering that the separate but equal doctrine had ceased to be the law of the land will be brought into the Union and treated as a part of the Union.

"I appeal to all Senators who think we should have a unified country with uniform laws applying to all areas of the country, because that is what the amendment would do." (Emphasis added).

After a short colloquy prior to voting, Senator Pell remarked:

MR. PELL. **"Mr. President, there is no question that the South has done a better job of desegregation than the North. This measure states that the law should be applied uniformly and fairly throughout the country. As the repetition of that legal position is a correct one, I urge that it be accepted."** (Emphasis added).

At this point the vote was called for, and the measure passed unanimously 91-0.

Congressional Record — Senate—S3014, March 1, 1972.

One is hard pressed to deny the meaning of this amendment so convincingly demonstrated by a rare spirit of unanimity. The Senate has spoken, without dissent, that all states should be treated as one. Without the slightest change this was enacted into law in its present form.

This occurred at a time when every member was presumed to know of **Swann**, and as said by Mr. Justice Powell, "it could hardly be contended that Congress was unaware of the legal significance of its 'racial balance' language". Knowing then of the im-

munities afforded de facto states by this Court's interpretation of 407(a), they voted without exception to extend them to all states. In the words of Senator Ervin "they will be brought into the Union and treated as a part of the Union".

Further confirmation of the congressional demand for uniformity is provided by Section 805 which reads:

> "The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public school shall be uniform throughout the United States."

Since discrimination by state authorities was always looked upon as the essential ingredient of the de facto-de jure dichotomy, this is particularly significant. No longer can different standards of proof be applied to yield unequal results. **Keyes v. School District No. 1, Denver, Colorado,** 445 F.2d 990, 1006 (10th Cir. 1971).

No logical reason remains for perpetuating this dichotomy. State segregation laws had their demise many years ago, and these labels are only used now to justify disparate treatment for the South. This incongruity is difficult to understand, for as Senator Pell said, "there is no question that the south has done a better job of desegregation than the north".

Congress has clearly chosen to abrogate this historic distinction, long out-moded, in favor of a uniform classification of states. The consqeuences of this determination are quickly discernable and mutually exclusive. Either Congress has created a right of action in de facto states, thus outstripping the courts, or the

protection against busing orders now applies to formerly de jure states.

As openly stated by Senator Ervin and approved by his colleagues without dissent, de jure states were to be brought into the union and treated in the same manner as others. Since de facto states were granted immunity from busing orders by **Swann**, this benefit must certainly inure to those recently allowed into the fold.

This is infinitely more plausible than the alternative interpretation. One can scarcely imagine that the elected representatives of states who constituency had never experienced the wrenching shock of forced busing, would suddenly engage in self mutilation and pass without objection, legislation to insure this "benefit". Even if such bizzare results were intended, would it appear in the form of an anti busing measure? The absurdity of this should be apparent.

This provision is not only subsequent to **Swann**, but couched in terms which destroy, in parts, its viability. It is a therapeutic response by the body created under the constitution, to fulfill this role. There is no doubt that it questions the wisdom of this Court's decision, but as recognized before:

> **"There is no reason to doubt that this Court may fall into error as may other branches of the Government.** Nothing in the history or attitude of this Court should give rise to legislative embarrassment **if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to re-examine its previous judgements or doctrine." Helvering v. Griffiths,** 318 U.S. 371, 400 (1943). (Emphasis added).

The mandate's of **Brown I** and **Brown II** have not

been trifled with (**Brown v. Board of Education,** 347 U.S. 483 (1954) and 349 U.S. 294 (1955). Neither has the establishment of a "Unitary System", as defined by this Court, been impaired. **Alexander v. Holmes County Board of Education,** 396 U.S. 19 (1969).

By restating the law in this manner Congress has imposed a simple and prudent restriction on how the goals of the Fourteenth Amendment are best accomplished. Desegregation is not proscribed, only a method. There are still half a dozen or more remedies, currently used in school cases, which remain available to a District Court. Having spoken for the first time it should not be ignored.

V.

FACTUAL ANALYSIS OF COURT ORDERED PLAN

In closing petitioners are compelled to stress again the facts which entitled relief. They are sufficient, in and of themselves, to justify and perhaps even demand this Courts' full attention.

Hopefully, issues raised by recent developments will be considered provocative, but they are not essential to a reversal of **Drummond.** To reach this judgement requires no new law, only the application of priniciples unanimously expressed by **Swann.**

As substantiation for this assertion the following comparison of cases is submitted. They are based on every category the available record of both opinions will justify.

A

(Charlotte Plan Justified By Facts There)

It is essential to realize at the outset that while this Court recognized the transportation of students as a permissible tool for desegregation, its use was not made mandatory. Much to the contrary there is a clear caution that the techniques used in **Charlotte** were made acceptable by the situation which confronted the District Court.[12]

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[12]This restriction was clearly recognized by the District Judge who noted:

> "... that the particular order entered in this case would be correct in other circumstances not before this court." (Emphasis in original). 402 U.S. 25, Note 9.

"**On the facts of this case,** we are unable to conclude that the order of the District Court is not reasonable, feasible and workable." (p. 30) (Emphasis added).

An overall reading of this decision leaves the indelible impression that the best which can be said of the District Court's order is that it was not reversed. It was never applauded and reflects only tepid acceptance. Restraint rather than adherence is implicit and inclines one to view it as the outward limits of discretion.

B.

(Limitations On A District Court)

While a Court's authority to fashion appropriate remedies is correspondingly broad, it is not unrestricted.

"No fixed or even substantially fixed guidelines can be established as to how far a court can go, **but it must be recognized that there are limits.**" (p. 28) (Emphasis added).

A recent lower court decision of considerable importance underscored this limitation, **Bradley v. The School Board of the City of Richmond, Virginia,** ___ F. 2d (4th Cir. 1972), decided June 5, 1972.

Even more recently the Chief Justice invoked a fitting analogy to emphasize this point. Speaking for the dissent in **Wright v. Council of City of Emporia,** ___ U.S. ___, ___ L.Ed.2d ___, 40 LW 4806 at 4814 (decided June 23, 1972), and joined by Justices Blackman, Powell, and Rendquist, Chief Justice Burger stated:

"In **Brown v. Board of Education,** 349 U.S. 294 (1955) (Brown II), the Court first conferred

on the district courts the responsibility to enforce the desegregation of the schools, if school authorities failed to do so, according to equitable remedial principles. **While we have emphasized the flexibility of the power of district courts in this process, the invocation of remedial jurisdiction is not equivalent to having a school district placed in receivership."** (Emphasis added).

It is this explicit limitation which serves to separate **Drummond** from **Swann, Davis,** and any other school decision approved by this Court. No rein has been applied to the power of the District Court herein, and being unfettered it was applied in a manner that appears almost vengeful. Nowhere does the record contain facts or findings sufficient to warrant the extremities resorted to. Having exceeded the extent of any measure condoned by the Supreme Court, it sails uncharted waters. This is a course District Judges may not pursue of their liking alone!

C.

(Use of Racial Ratios)

Although the outward parameters of **Swann** may be vague, certain prohibitions are most explicit. A prime example of what a District Judge may not do is illustrated by the claim that a particular degree of racial balance was required in Charlotte schools.

The record discloses that the order resulted in elementary schools whose composition ranged from 9% to 38% black as opposed to the system-wide average of 29%.

Chief Justice Berger articulated quite forcefully on this issue:

"If we were to read the holding of the District

Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, **that approach would be disapproved and we would be obliged to reverse.**" (p. 24) (Emphasis added).

Reiterated at **Winston-Salem/Forstyth County Board of Education v. Scott,** 404 U.S. 1221 (1972).

A comparison with the desegregation plan ordered for the elementary schools of Richmond County shows unquestionably that this imperative was either misconstrued or misapplied.

This plan required that 29 of the existing 42 elementary schools be paired or grouped into 10 separate zones with racial distribution as shown below.[13]

Zones	Schools	Pupils	% Black	
A	4	1522	40.8	
B	4	2154	46.1	
C	3	2189	44.4	
D	3	1940	43.7	
E	2	652	44.0	
F	2	1198	30.2	
G	3	960	38.8	
H	3	1080	43.1	
I	2	1113	40.1	
ALT.	3	1684	34.2	
TOTALS	29	14,492	41.02	Overall Black

From the diagram one is forced to conclude that awareness of the 60%-40% racial composition of the whole system was not utilized simply as a useful starting point in shaping a remedy. In the final analysis Court-ordered clustering results in an overall black

[13]Appendix V, Petition for Certiorari.

percentage that deviates only 1.02% from the system average.

Even the individual zones evidence a peristent adherence to this ratio. This point is illustrated by the permissible range of variation from the overall average. In Charlotte a fluctuation of 29% was accepted, whereas the latitude here is only 15% or 1/2 that amount. Stated conversely, the restriction imposed on Augusta was twice as extreme.

Based on all these factors, it cannot be said that "the very limited use made of mathematical ratios was within the discretion of the Court". On the contrary, it is the product of a desegregation plan which relied entirely upon them. Such a standard is constitutionally impermissible.[14]

The latest expression of this court on that precise issue was again by the Chief Justice, **Wright,** supra. Addressing himself at length to the concept he observed:

> "Obsession with such minor statistical differences reflects the gravely mistaken view that a plan providing more consistent racial ratios is somehow more unitary than one which tolerates a lack of racial balance. Since the goal is to dismantle dual school systems rather than to reproduce in each classroom a microcosmic reflection of the racial proportions of a given geographical area, there is no basis for saying that a plan providing a uniform racial balance is more effective or constitutionally preferred. School authorities

[14]This is tacitly acknowledged in the order of the District Judge who observed that while the Experts may not have set out to establish a fixed black to white ratio:"However through clustering and pairing it achieves a not dissimilar result." (Emphasis added), Appendix III, A-15, Petition for Certiorari.

may wish to pursue that goal as a matter of policy, but we have made it plain that it is not constitutionally mandate. See **Swann v. Charlotte-Mecklenburg Board of Education,** 402 U.S., at 16." At page 4813.

In view of the statistics earlier shown, scarcely any credible argument can now be advanced to support the plan. The complete reliance on racial ratios is obvious and all pervasive. In approving the final product the District Court fell into a predictable trap. This dilemma is described to perfection in 85 Harvard Law Review 3:

> "A district judge faced with pressures for a lesser degree of integration might justify his use of percentages by reference to **Swann**: since the Court has never approved a plan in which racial percentages varied more widely, the only way to be sure of compliance with the constitutional command is to approximate **Swann's** scheme." (p. 83)

As we have seen, unfortunately, the variance in racial percentage does not simply approximate **Swann,** but is twice as restricted.

D.

(Permissible Scope Of Required Transportation)

These results are achieved by a massive increase in transportation. This is a volatile subject which **Swann** dealt with in a most guarded manner.

> "The scope of permissible transportation of students as an implement of a remedial degree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision." (p. 29)

Under the "Finger Plan" 9,300 additional elementary students were required to be transported from

a total Charlotte elementary population of 44,000. No figures were reported on the number bused prior, but the total for the entire system amounted to 21%.

In Richmond County there are 21,795 elementary students, of which 6,945, or 31.86%, were already being bused.[15] The order of the District Court required a transportation increase of 6,172 elementary students.[16]

This escalation has very startling consequences, for it creates a situation in which 61.77% of the elementary school children must now be bused.

Even more drastic is the impact upon the students in the 29 schools paired or clustered. Under the HEW plan 21.57% of the students enrolled in these schools were bused, a figure which now soars to 64.16%.

In considering the elementary portion of the Charlotte plan the Circuit Court determined that its increases were too extreme. They illustrated this conclusion by a formula which provides a useful comparison here.[17]

Percentage Increase of Additional Elementary Students Bused As Opposed To All Students

Charlotte	39% or 33% as Computed by Minority
Richmond County	58%

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[15]All computations concerning Augusta-Richmond County Schools are based on figures contained in the Munzer Plans, a portion of which is set out in Appendix V, Petition for Certiorari.

[16]6,172 reflects the correct increase in elementary busing. It is in conflict with the figure of 5,681 as shown by the District Court's Order, Appendix III, Petition for Certiorari, which fails to include Alternate Zone.

[17]431 F.2d 138, 147 (4th Cir. 1970).

By this standard the disparity is perhaps more apparent. The increased elementary busing in this case is at least 19% greater than the figure classified by one Court as too extreme.

Even though this portion of **Swann** was ultimately reversed there is no indication that such increases would be approved elsewhere. Certainly there is nothing to indicate that they could be expanded to an even greater extent.

E.

(Valid Objections To Transportation)

Perhaps the most formidable consequence of the District Court's order is the effect it has on the grade structure of elementary schools. Previously the school system had been operated on a 7-2-3 basis which enabled a child to complete the first seven years in one school.

Pursuant to this order 69% of the elementary schools have been paired or clustered. They no longer have a standard grade structure, as the number of grades in a particular school depends on the number of schools in its zone. The size of the zone also dictates the number of schools a child must now attend during the course of elementary education.

Seven zones are composed of either three or four schools. The students who attend these schools constitute 53% of the entire elementary population. Thus we have a situation which requires over 1/2 of the elementary children in the system to attend three or four separate schools in seven years.

The absurdity of this arrangement is emphasized

by comparison with the "Finger Plan".[18] It served to pair or cluster 46% of Charlotte elementary schools in such a manner as to achieve a 1-4 and 5-6 grade structure.

By these categories compulsory changes are minimized. Elementary children will therefore attend, at the most, only two schools. This is a factor readily distinguished from the procrustean demands of the Augusta counterpart.

A portion of **Swann** is addressed directly to this combination of evils:

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process." (p. 30)

Transportation of better than six of every ten elementary students, some over long distance, in conjunction with the requirement that 53% must attend three of four elementary schools is indeed a situation which, "impinges on the educational process".

F.

(Capacity To Implement)

A school desegregation plan must also have room for pragmatic considerations. A restriction is implicit in **Swann**:

> "25. The remedial technique of requiring bus transportation of public school students for purposes of racial desegregation is within a Federal District Court's power to provide equitable relief, where . . .

[18]311 F.Supp. 265, 280, 281 (W.D.N. Car. 1970).

(2) **Implementation of the District Court's decree is well within the capacity of the local school authority.**" (Emphasis added).

A similar theme was expressed in **Davis v. Board of School Com'rs of Mobile County**, 402 U.S. 31, 37 (1971) by noting that desegregation should be achieved "taking into account the practicalities of the situation".

This was resolved affirmatively in Charlotte for obvious reasons. The school system had a total operating budget of $51,000,000 of which approximately $500,000, or less than 1% (0.0098), was spent for annual transportation costs.[19]

The cost of increased elementary transportation was determined to be $672,000, or only 1.2% of the annual budget. Combined with current transportation expenditures it amounted to no more than 2.3% of that budget.

A radically different situation exists for Augusta's school system whose annual budget is only $21,000,000. Of this sum $572,000 was spent for transportation before the Court order. This is 2.7% of the total budget and represents a larger portion than was spent in Charlotte even after the increased elementary costs.

Here the additional transportation will require $644,000,[20] or 3.7%, of the budget. When combined with current outlays it amounts to some 5.8%. The aggregate of these costs, irrespective of percentages, is $44,000 more than the comparable figure in Charlotte.

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[19]431 F.2d 138, 156 (4th Cir. 1970).

[20]This is a minimum figure and requires that schools be opened at hours ranging from 7:30-10:30 A.M.

G.

(Busing Not Demanded)

In the space of a single year this school system has been wrenched to an unbelievale extreme. Only 12 months ago schools were operated under an HEW plan approved by the District Court.

Without respite or interlude it is now decreed that an incredible gulf be leaped in a single bound. How has this all come about? The only plausible answer is that the lower Court misread the requirements of **Swann.**

Very persuasive support for this proposition is found in the words of the District Judge wherein he categorizes it as the "Busing" and "Racial Ratio Case".[21]

Several other Courts have viewed it differently, and, I think, properly.

> "While this case approved the use of busing as one tool for school desegregation, it did not hold that the plan implemented in Charlotte was a Constitutionally commanded plan, or that a less drastic plan might not have met Constitutional requirements." **Davis v. Board of Education of North Little Rock, Ark.,** 328 F.Supp. 1197, 1204 (E.D. Ark. 1971).

Even more emphatically:

> **"We therefore, initially observe that while the Supreme Court found legally tolerable what may be referred to as the Mecklenburg rule, it by no means directed that its commands be obeyed everywhere."** (p. 636)

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[21]Appendix III, Petition for Certiorari.

"Swann approved a District Court ordered plan for the busing of children to improve the racial mix in the involved school system. **It did not, however, direct that a plan of transporting school children must be a part of every new plan for improvement of the objective of desegregation." Goss v. Board of Education of City of Knoxville, Tenn.,** 444 F.2d 632, 537 (6th Cir. 1971). (Emphasis added).

Recent Courts in some instances have even found busing to be undesirable. A graphic example may be seen in **Calhoun v. Cook,** ____ F.Supp. ____, (N.D. Ga. 1972) decided June 8, 1972. Here the District Judges for the second time expressly rejected a mass busing plan for Atlanta, Georgia.

This determination was reached after an incisive appraisal of busing, its ramifications, and the competing interests involved.

Such a conclusion is justified by the words of Chief Justice Burger:

"A school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. **The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."** (pp. 15, 16) Emphasis added)

This clearly contemplates that busing is a remedy that must be chosen and limited with regard to other values upon which it impinges. See also **Cisneros, Austin supra.**

H.

(Age Of Students To Be Bused)

The availability of less rending solutions is well

illustrated by the secondary schools. A constitutional plan for their desegregation was approved by the same Court on June 13, 1972. It did not require the extremes of the elementary plan, more importantly, it was accomplished without significant increase in busing.

We therefore have a complete inversion in Richmond County. Because of this anomaly the burdens of transportation have been cast exclusively upon the youngest students.

Certainly this is a travesty **Swann** intended to avoid by recognizing that the limits on permissible transportation would be affected by many factors:

> **". . . but probably with none more than the age of students."** (p. 31) (Emphasis added).

I.

(Feasibility Of Charlotte Plan)

Considerable emphasis was placed by this Court in **Swann** on the resulting increase in transportation efficiency. Elementary students, under that plan, would now travel less than 1/2 the average time and distance formerly required for the system.

> "In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation." (p. 30)

Such stress inclines one to suspect that, absent these factors, the decision may have been otherwise.

The Richmond County Plan is devoid of such salutary aspects. Both the time and distance of bus routes have been increased for every zone. No major

transportation arteries exist.[22]

> **"I don't think this would make a great deal of difference in Augusta, in the sense that there are no good, through, expressways for transporting kids here. The main highways are stop and go now."** (Emphasis added)

Conversely, there is only the ubiquitous freight train, the tracks of which serpentine across the city.[23]

J.

(Single Grade Schools)

To fully appreciate this portrait of an educational anathema one must realize the extreme measures to which its drafters were willing to resort.

> "Well, there's one major problem that I feel must be discussed and brought to light, **and that is the fact that this town is split in two by a railroad, and at the present time we have one regular school bus crossing that railroad track."** (Emphasis added)
>
> • • • • •
>
> **"It completely blocks the whole town. There's no way to get around it except over the Gordon Highway. The police and fire departments are constantly faced with this hazard."** Emphasis added)

In order to satisfy an obsession for predetermined racial balance, ratios were given precedence over children. This manifests itself in the creation of single grade schools, a final atrocity which exposes the faulty

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[22]Testimony of Mr. Herman, page 43, Transcript of hearing held October 8, 1971.

[23]Testimony of Mr. Turner, Transportation Director, Richmond County School System, page 206, Transcript of hearing held December 17, 1971.

concept upon which it is based.[24]

Consequently, there now exists in Richmond County one entire school devoted to third grade students, with another which houses only fifth graders.[25] The isolation that results for these students is admittedly undesirable, but how else could the desired percentages been achieved?[26]

> Question: In essence, your plan deals with a mass movement to achieve a racial balance? You do not consider the individual . . .
>
> Answer: Well, "mass movement" is a relative term and within your framework I suppose it would be mass movement.
>
> **"Well, that's actually the same question about isolation of any group in any educational process and I wouldn't say that isolation in any particular group like this is an ideal type of solution, but in this case, how else does one do this?"**

This plan is a mutation, not the legitimate progeny of **Swann.** Unfortunately, however, this strain will thrive and even more aberrant versions will follow unless this Court demands otherwise. It could and should be done in a case such as this.

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[24]Cross-examination of Dr. Munzer, page 110, Transcript of hearing held December 17, 1971.

[25]Appendix III, A-21, 22, 26; Appendix V, A-49.

[26]Testimony of Mr. Herman, page 35, Transcript of hearing held October 8, 1971.

CONCLUSIONS

This brief has been submitted with more than normal apprehension that it might go unheeded. It has become increasingly apparent, of late, that the merits of this case may be obscured completely by geographical considerations. Hopefully, such skepticism is unwarranted, and the fact that a deep south school system is involved will be inconsequential.

Regardless, petitioners desire that their position be on record and completely documented. Someday, perhaps, this will prove informative, for if cases such as this continue to be ignored our entire judicial system may undergo a devastating reassessment.

We do not belabor our highest Court with a cause founded upon Jim Crow law, enacted in the dark of night by a klan-filled legislature. Much to the contrary, we rely on an Act of Congress (the law of the land unless otherwise declared), two recent full bench decisions of the Circuit Court, and, finally, this Court's unanimous opinion in **Swann.** If that authority is shoddy, then we deserve nothing.

The last two weeks have provided a rude and frightening awareness. Events which prompted this ominous realization are fully described herein and have given rise to genuine consternation which cannot go unexpressed. These remarks reflect concern, not disrespect, and since our day in court is problematic, this may well be our only forum.

Seeking to utilize the moratorium provisions of Section 803, enacted specifically for cases such as this, I moved for a stay. To my utter amazement a District Judge, long admired, branded this as an effort to deprive others of Fourteenth Amendment rights.

The denial, at this point, is anticlimatic, but the reason why it was done made a vivid impression. It was held that "until all appeals are exhausted" did not contemplate "certiorari", which just happened to be the only way this case could ever get before the Supreme Court. Resort to such logic by a Judge, whose scholarly opinions are always tightly reasoned, must have been painful.

Admittedly dismayed, we proceed on. Next to rule on the merits of this issue was the Honorable John R. Brown, Chief Judge of the Fifth Circuit Court of Appeals. He takes pride in coming to grips with issues. When another Judge, **Austin** supra, counseled the court to wait he responded: "Were we to do so we would, in my view, abdicate our function . . . To the contrary this court and each of its members faces up to hard decisions. We have made them." That determination vanished here. He simply wrote denied, thereby indicating, to me at least, that the reasoning of the District Judge was more than he could approve but better than he wished to do himself.

Next to confront this growing dilemma was Mr. Justice Powell, whose courtesy I remember and appreciate. He denied the stay, and though rejecting the ruling below his opinion appeared equally vulnerable. It relied upon congressional intent, the one ground that could be refuted, or so it seemed.

Page after unimpeachable page from the Congressional Record reassured me of his error. Seeing only the law, and what its authors said it meant, we felt obligated to bring this oversight to the attention of the Chief Justice. Another stay, meticulously documented was filed and a week passed. Today I learned it was denied without comment.

At this juncture one must admit to a considerable measure of disillusionment. Having started the journey armed with what was and still is the law, though it now has no practical affect, our reception was unexpected. Twice we received denials based on reasons which could not stand the light of day. Twice again, the Chief Judge and the Chief Justice have taken refuge in silence.

Certainly this response is within the prerogative of a Judge or Justice, but where does it leave us? Does it mean that an interpretation, completely antithetical to Congress' intent, has become the law of the land? Did Congress really act with such buffoon like ineptness as to legislate a stay for court orders both they and **Swann** declare illegal?

I do not know — neither will anyone else. Surely, in so vital an issue, this country deserves more from its highest tribunal than muteness.

Respectfully submitted

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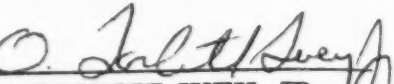
September 8, 1972

HARRIS, CHANCE & McCRACKEN

CERTIFICATE OF SERVICE

This is to certify that I have on this day served the Honorables Franklin H. Pierce, Leonard O. Fletcher, Jr., and J. H. Ruffin, counsel for respondents by personally handing them three copies each of the within motion and supplemental brief.

This 15th day of September, 1972.



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